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No. 88-158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHOENIX CANADA OIL COMPANY, LIMITED,

Plaintiff-Petitioner,

vs.

TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY and GULF OIL CORPORATION (Now, by change of name, CHEVRON U.S.A. INC.),

Defendants-Respondents,

– and –

TEXACO INC.,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

Introduction

Defendants nowhere deny that the payment decrees and regulations are laws and acts of state, and that they relate to the 1974 and 1977 transactions. Defendants frankly admit they are "statements by the Government of what, in fact, it paid for" (Resp. Br. at 10). Given this, it was incumbent upon Defendants to provide some plausible explanation of the lower courts' inexplicable failure to address the decrees either in an Act of State Doctrine or Comity analysis. None has been offered.

Defendants' entire opposition rests upon their description of the important legal questions presented in the Petition as mere issues of fact. This is a serious error, and it does not withstand analysis.

Their argument that this case is not "special or important" enough to merit review in this Court because the decrees affect only certain specific transactions (Resp. Br. at 7-8) is meaningless. The same is true in virtually every act of state case.

(1) The Question of Law

Defendants argue that the payment decrees are merely evidentiary matter, no different from any other factual evidence, related to the "factual" question of what the government paid for. But laws are not mere factual evidence capable of being overridden by supposedly contrary testimony. Within the factual circumstances to which it applies, a law naturally prevails over other evidence.

This is not novel theory (See Resp. Br. at 10). The Act of State Doctrine

has long mandated that a foreign government's official act concerning the subject matter of a case cannot be questioned and must be accepted as a rule for the court's decision. Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918). Such deference is particularly required in matters relating to a foreign government's regulation of its oil resources (Pet. at 48).

Defendants' proposition stands this axiom on its head. It places definitive official acts of a foreign government at the lowest rung of the evidentiary hierarchy, while the interested testimony of the parties, together with the testimony of former officials procured long afterward becomes supreme. Under this approach, plainly applicable laws can be cleverly avoided by a party able to produce enough such witnesses years later

to rewrite them through "clarification."

In contradiction to this bizarre theory, however, Defendants admit that Plaintiff's contract claim for continuing royalty payments was dismissed as a matter of law on the basis of Resolution 11927, a 1974 regulation. (See A241-A243) (Resp. Br. at 5 n.5). They thus acknowledge, and indeed insisted in the courts below, that a government act having the force of law prevails over factual evidence and controls the outcome. Having done that insofar as Resolution 11927 is concerned, they should not be heard to argue the opposite in regard to the payment decrees. Defendants' argument thus reveals itself for what it is: acceptance of the rule of law when it leads to a favorable outcome and avoidance of the law when it leads to an unfavorable outcome.

(2) The Purported Ambiguity

When ordering the trial, the District Court was considering the transfer agreements and little else (Pet. at 28-29). But contrary to Defendants' argument (Resp. Br. at 8 n.8), it was not the phrase "rights and assets" that was ambiguous. That phrase is clear. The ambiguity arose from the gap between that phrase and Defendants' claim that despite what the agreements clearly said, the government in the end paid only for equipment and not for rights (A259-260).

Notwithstanding the absence of any documentary support for this assertion (Pet. at 29-30), the District Court gave Defendants the benefit of the doubt and ordered the trial. But the Court very clearly left it open for Plaintiff to prove, either as a matter of fact or

law, that the payments, although calculated by reference to book value, were lump sum purchase prices for all of the consortium interests conveyed, including the oil production rights. (A260-261; A196-A197; A199-A200; Pet. at 29-30).

The reiteration of the "rights and assets" language in the payment decrees thus did not repeat any ambiguity. (See Resp. Br. at 8 n.8). It made clear that "rights and assets" were exactly what the government was paying for and showed that the purported ambiguity had been created by Defendants out of whole cloth. The payment decrees do not require "interpretation." They are clear. Once they were presented to the trial court, that should have resolved as a

matter of law any lingering issue of what was paid for.[1]

(3) The Issue of Validity

Defendants assert that they have not challenged the validity of the payment decrees or the government's authority to issue them (Resp. Br. at 10). Nevertheless they contend that unspecified provisions of Ecuadorian law forbade the payment for rights (Resp. Br. at 6 n.6, ¶ 4) and that the District Court placed great reliance on this. But by the latter contention, Defendants openly seek to justify the result below

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[1]Defendants err in asserting that the "rights and assets" language appears only in the "recitals" of Decree 666 and 1030 (Resp. Br. at 8 n.8). In fact, it appears in the first "operative" article of each of those decrees (A392, A397). In any event, it is wrong to argue that recitals have no meaning. The Court of Appeals found the recitals of Resolution 11927 to be very important (A20).

upon the theory, notwithstanding their contradictory protestation, that the payment decrees were illegal to the extent they provided that the payments were for rights. This lays bare the absurdity of their position and the error of the courts below. The payment decrees could not be illegal under Ecuadorian law; they were Ecuadorian law. Ecuadorian law did not prohibit payment for rights; it required it and defined the payments as being just that.

Defendants should not have been permitted on one hand to accept the validity of the decrees as laws, and then on the other to mount a back door effort to evade their impact by demoting them to mere "factual" evidence, procuring contradictory testimony and then arguing that the testimony takes precedence.

Because of the foregoing, the simple fact that the lower courts did not expressly declare the payment decrees to be invalid does not mean that the Act of State Doctrine is not implicated (Resp. Br. at 10). If courts may dispense with the Act of State doctrine in this sub silentio fashion, the doctrine itself is emasculated. The same, of course, is true for any rule of law.

(4) The Deposition Testimony

Plaintiff did not assert that United States v. U.S. Gypsum Co., 333 U.S. 364 (1948) lays down "a general rule of exclusion regarding oral testimony" (Resp. Br. at 12). It does contend that where oral testimony conflicts with contemporaneous documents -- in this case laws and other acts of state which define the payments as inclusive

of rights -- the contrary testimony is entitled to little or no weight.[2] Furthermore, since Defendants claim that the legislators were not called to explain the meaning of the laws in question (Resp. Br. at 12), then there was no reason whatsoever for the lower courts not to apply the clear terms of those laws.

(5) Foreign Relations

Defendants' argument that there was some requirement for Plaintiff to obtain a "Bernstein letter" from the State Department (Resp. Br. at 11) is wrong. The notion that the predilections of the State Department at any particular point

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[2]That testimony did not "clarify" the documents (Resp. Br. at 12). It attempted to amend them ten and twelve years after they were written by deleting the parts which expressly declared that the payments included rights.

in time can alter the constitutional demarcation between the respective roles of the executive and the judiciary has been rejected by a majority of the justices of this Court and is not the law. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 776-77 (1972).

In referring by analogy to other allegedly "expropriatory" actions of the Ecuadorian government (Resp. Br. at 4), Defendants implicitly charge Ecuador with nothing less than an uncompensated confiscation of their contract rights. Thus, again despite their protestations to the contrary (Resp. Br. at 11), Defendants are in fact asking this Court to sustain the ruling below on just that basis. But, as the Petition points out, where the executive branch has negotiated with the foreign government and has

refrained from charging confiscation, Sabbatino warns the judiciary to refrain from making a determination to that effect (Pet. at 66).

Defendants' related argument that the lower courts' judgment cannot adversely affect U.S. foreign relations because it was "in full accord that Ecuador's own view of its law" (Resp. Br. at 11) has no basis. This statement is premised entirely upon Defendants' "political philosophy" argument. It is nothing less than an attempt to justify the lower courts' improper inquiry into the motivations underlying Ecuador's official acts and to attack the validity of payment decrees insofar as they declared the payments to be for rights.[3]

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[3]As shown in the Petition, and Defendants apparently do not challenge this, the result in this case could well have been different in the Second and Ninth Circuits, which, unlike the Third (continued...)

(6) Documents Reflecting Other Acts of State

Defendants' argument that the 1975 audit contract and the 1977 opinion of the Minister of Finance need not be considered because they are not laws again misstates the Act of State doctrine. A foreign government's pronouncement obviously does not have to be a law for it to have the force of an act of state.

Those other acts of state are highly relevant because they contain statements by Defendants constituting admissions together with evidence of the government's own clear understanding that the net book value formula resulted in a purchase price covering all of the

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[3](...continued)
Circuit, have repeatedly prohibited such inquiries (Pet. at 44-50).

consortium's interests, including contract rights. Clearly, this unbroken succession of official documents, capped by the specially enacted laws appropriating the monies and declaring what they were for, should have been conclusive in comparison to contradictory oral testimony procured so many years afterward.[4]

CONCLUSION

Defendants fail to refute the reasons shown in the Petition why the writ should be granted. The lower courts failed to apply relevant laws

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[4] In addition to the decrees and regulation, Plaintiff offered other contemporaneous evidence at trial, examples of which are included in the Appendix, proving that the payments were for rights as well as assets. (E.g., A372, A376, A380, A431, A459, A461, A465). The trial record also contained numerous contemporaneous admissions to this effect by Defendants themselves.

specifically enacted to control the transactions at issue. Their decisions have resulted in a grave miscarriage of justice. The writ should be granted.

Dated: New York, New York
October 7, 1988

Respectfully submitted,

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